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UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

COLUMBIA RIVERKEEPER; IDAHO)	<u>No. 2:17-cv-289</u>
RIVERS UNITED; SNAKE RIVER)	
WATERKEEPER; PACIFIC COAST)	COMPLAINT
FEDERATION OF FISHERMEN'S)	
ASSOCIATIONS; and THE INSTITUTE)	
FOR FISHERIES RESOURCES)	
)	
Plaintiffs,)	
)	
v.)	
)	
SCOTT PRUITT, in his official capacity as)	
Administrator of the U.S. Environmental)	
Protection Agency; and the U.S.)	
ENVIRONMENTAL PROTECTION)	
AGENCY)	
)	
Defendants.)	

COMPLAINT – 1

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I. INTRODUCTION

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3 1. Plaintiffs bring this suit to compel Defendants, collectively the U.S.
4 Environmental Protection Agency (“EPA”), to issue a pollution budget, called a total maximum
5 daily load (“TMDL”), for temperature pollution in the Columbia and Snake Rivers in Oregon
6 and Washington.

7
8 2. For many years, summer water temperatures in the Columbia and Snake Rivers
9 have exceeded state water quality standards, harming salmon and steelhead, and triggering the
10 Clean Water Act requirement to issue a TMDL. EPA began preparing the TMDL in 2000 and
11 released a draft TMDL in 2003, which identified dams on the Columbia and Snake Rivers as the
12 primary contributors to high water temperatures. But EPA abandoned the TMDL process shortly
13 after releasing the draft and never issued a final TMDL.
14

15 3. Meanwhile, high water temperatures persist and continue to exceed state water
16 quality standards and harm imperiled salmon and steelhead. In summer 2015, roughly 250,000
17 adult sockeye salmon died in the Columbia and Snake Rivers because warm water prevented
18 them from successfully migrating upstream.
19

20 4. Plaintiffs seek declaratory judgment that EPA violated its mandatory duty under
21 Section 303 of the Clean Water Act (“CWA”), 33 U.S.C. § 1313(d)(2), and has committed an
22 unreasonable delay under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), by
23 failing to issue a temperature TMDL for the Columbia and Snake rivers in Oregon and
24 Washington. Plaintiffs also seek injunctive relief ordering EPA to promptly prepare a
25 temperature TMDL. Finally, Plaintiffs request an award of reasonable litigation costs and fees
26 and any other relief they may request or this Court may deem appropriate.
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II. JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 5 U.S.C. §§ 702–03 (Administrative Procedure Act), and 33 U.S.C. § 1365(a)(2) (Clean Water Act). The relief requested herein is authorized by 33 U.S.C. § 1365(a), and by 5 U.S.C. §§ 551(13) and 706(1).

6. In accordance with the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A), Plaintiffs notified EPA of its violations of the CWA and of Plaintiffs’ intent to sue under the CWA by letter dated and postmarked August 15, 2016 (“Notice Letter”). At the time of the filing of this Complaint, more than sixty (60) days have passed since the Notice Letter was issued.

7. Venue is appropriate in the Western District of Washington under 28 U.S.C. § 1391(e)(1), because Defendant EPA has offices in the Western District of Washington, portions of the Columbia River lie in the Western District of Washington, and a substantial part of the events and omissions alleged herein occurred in the Western District of Washington.

III. PARTIES

8. Plaintiff COLUMBIA RIVERKEEPER is suing on behalf of itself and its more than 12,000 members. Columbia Riverkeeper is a 501(c)(3) non-profit corporation registered in the State of Washington. Columbia Riverkeeper’s mission is to restore and protect the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. To achieve these objectives, Columbia Riverkeeper implements scientific, educational, and legal programs aimed at protecting water quality and habitat in the Columbia River Basin. This lawsuit is part of Columbia Riverkeeper’s effort to improve water quality in the Columbia River for purposes including salmon and steelhead recovery and subsistence, recreational, and commercial fishing.

1 9. Plaintiff IDAHO RIVERS UNITED is suing on behalf of itself and its 3,500
2 members. Idaho Rivers United is a 501(c)(3) non-profit corporation registered in the State of
3 Idaho. Idaho Rivers United's mission is to protect and restore the rivers of Idaho. To this end,
4 Idaho Rivers United works to safeguard Idaho's imperiled wild steelhead and salmon, protect
5 and enhance stream flows, improve water quality, and defend and promote the many benefits that
6 flow from Idaho's rivers through advocacy and outreach. This lawsuit is part of Idaho Rivers
7 United's effort to keep Idaho's rivers flowing and to restore Idaho's once mighty runs of
8 steelhead and salmon—anadromous fish born in Idaho, which migrate down the Snake and
9 Columbia Rivers to the Pacific Ocean, and then return to Idaho to spawn and die.
10

11 10. Plaintiff SNAKE RIVER WATERKEEPER is suing on behalf of itself and its 350
12 members. Snake River Waterkeeper is a 501(c)(3) non-profit corporation registered in Idaho.
13 Snake River Waterkeeper's mission is to use science and law to protect, restore, and sustain
14 waters of the Snake River basin. Snake River Waterkeeper monitors water quality, investigates
15 citizen concerns, and enforces environmental laws with the goal of swimmable, fishable, and
16 drinkable water basin-wide. This lawsuit is part of Snake River Waterkeeper's efforts to improve
17 water quality in the Snake River, increase fish habitat and natural reproduction, and restore
18 native fish populations throughout the basin.
19

20 11. Plaintiff PACIFIC COAST FEDERATION OF FISHERMAN'S
21 ASSOCIATIONS ("PCFFA") is 501(c)(3) non-profit corporation. PCFFA has two regional
22 offices, including its Northwest Regional Office in Eugene, Oregon. PCFFA is the largest and
23 most active trade association of commercial fisherman on the West Coast, representing 16
24 member organizations. PCFFA's members span the West Coast, from San Diego to Alaska.
25 PCFFA is active in the halls of Congress, implementing Coast Guard safety regulations,
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1 protecting river flows, promoting high quality seafood, stopping water pollution discharges, and
2 opposing dam operations. PCFFA has devoted substantial resources to protecting fish from dams
3 on the Columbia and Snake Rivers, and this lawsuit is part of PCFFA's efforts to restore and
4 sustain fish populations throughout the Columbia River basin.

5 12. Plaintiff INSTITUTE FOR FISHERIES RESOURCES is a 501(c)(3) non-profit
6 corporation headquartered in San Francisco, California. Established in 1993 by the PCFFA,
7 Institute for Fisheries Resources carries out fishery research and conservation needs of working
8 fishing men and women and works toward its vision of global sustainable fisheries. To this end,
9 Institute for Fisheries Resources works on salmon protection and restoration issues, with a focus
10 on dams, water diversions, and forestry, as well as conservation projects and advocacy
11 throughout the Pacific Northwest and beyond.

12 13. Plaintiffs have standing to bring this action. Plaintiffs have many staff, members,
13 and supporters who live, work, and recreate in and near the Columbia and Snake Rivers in
14 Oregon and Washington, and in and near tributary streams that sustain, or historically sustained,
15 Columbia and Snake River salmon and steelhead. Plaintiffs' staff, members, and supporters
16 regularly use and enjoy the waters and the surrounding areas that are adversely affected by high
17 temperature in the Columbia and Snake Rivers. They use these areas for, *inter alia*, fishing,
18 hiking, walking, photographing, boating, and observing wildlife.

19 14. The environmental, health, aesthetic, recreational, and/or economic interests of
20 Plaintiffs and their members have been, are being, and will be adversely affected by the
21 Defendant EPA's failure to prepare a temperature TMDL. Elevated temperatures degrade water
22 quality and jeopardize the health of fish and other aquatic life in the Columbia and Snake Rivers
23 and their tributaries, impairing Plaintiffs' interests. As a result, Plaintiffs' members refrain from

1 fishing, hiking, walking, photographing, boating, and observing wildlife and other activities on
2 the Columbia and Snake Rivers and/or enjoy those activities less. Plaintiffs' members include
3 commercial fisherman who are harmed economically and/or face a risk of economic harm.

4 15. Furthermore, EPA's failure to issue the TMDL injures Plaintiffs by diverting and
5 depleting each organization's time, resources, and effort, and by preventing Plaintiffs from
6 obtaining and disseminating information to their members and the public and from advocating
7 solutions to water temperature problems, impairing Plaintiffs' abilities to further their
8 organizational missions. Protecting water quality on the Columbia and Lower Snake Rivers, and
9 restoring their fisheries, are core parts of Plaintiffs' organizational missions. Plaintiffs have spent
10 and continue to spend time, resources, and effort to ensure EPA issues a temperature TMDL,
11 adheres to the Clean Water Act and its implementing regulations, and protects water quality and
12 fisheries, and to ensure that other regulatory agencies adequately and appropriately carry out
13 their obligations to protect water quality, including the issuance by states of National Pollutant
14 Discharge Elimination System ("NPDES") permits authorizing discharges to these waters that
15 comply with wasteload allocations established in TMDLs.

16 16. These injuries are fairly traceable to the violations and are redressable by the
17 Court. EPA's issuance of a TMDL for the Columbia and Snake Rivers will help achieve
18 compliance with state temperature standards in these rivers, which are designed to protect
19 aquatic species including salmon and steelhead. Congress and EPA have determined that
20 establishing TMDLs for impaired waterways is an effective tool for achieving water quality
21 standards. Without a TMDL, there is no EPA-approved Clean Water Act pollution budget in
22 place that identifies temperature pollution sources, specifies reductions necessary to bring about
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1 compliance with water quality standards, and initiates the Clean Water Act process for achieving
2 such compliance.

3 17. At all relevant times, Plaintiffs were and are “persons” as the term is defined by
4 the Clean Water Act, 33 U.S.C. § 1362(5).

5 18. Defendant SCOTT PRUITT is sued in his official capacity as Administrator of the
6 U.S. Environmental Protection Agency. As Administrator, Mr. Pruitt is in the highest position at
7 the agency, with the authority and responsibility to implement the Clean Water Act.
8

9 19. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is an agency of
10 the United States charged with implementing and ensuring compliance with the Clean Water
11 Act, among other federal environmental statutes. EPA is divided into geographic regions. EPA
12 Region 10 oversees EPA’s operations in Washington, Oregon, Idaho, and Alaska. EPA Region
13 Region 10 is based in Seattle, Washington.
14

15 IV. LEGAL BACKGROUND

16 The Clean Water Act

17 20. In 1972, Congress passed the Clean Water Act “to restore and maintain the
18 chemical, physical, and biological integrity of the Nation’s waters” 33 U.S.C. § 1251(a). To
19 meet these goals, states establish water quality standards that protect specific uses of waterways.
20 33 U.S.C. § 1313(a)–(c).
21

22 21. The Clean Water Act requires states to list waterways that do not meet applicable
23 water quality standards and, therefore, where uses are not being protected. 33 U.S.C. §
24 1313(d)(1). This list is often referred to as a state’s “303(d) list” or list of “impaired waters.”
25

26 22. When a state lists a waterway as impaired, the Clean Water Act requires the State
27 and EPA to quickly prepare a plan to fix the water quality problem. 33 U.S.C. § 1313(d)(1)(C);
28

40 C.F.R. § 130.7(c)(1). That plan is called a total maximum daily load or TMDL. *Id.* A TMDL identifies the sources of pollution and works like a pollution budget, restricting each source of pollution to the “level necessary to [meet] the applicable water quality standards with seasonal variations and a margin of safety.” *Id.*

23. For each impaired waterway, the state must submit a TMDL to EPA for approval or disapproval. 33 U.S.C. § 1313(d)(2). States were required to submit their first lists of impaired waters and TMDLs within 180 days and are required to continue making submissions from time to time. *Id.* Upon receiving a TMDL from a state, EPA must decide within 30 days whether the TMDL is adequate. *Id.*; 40 C.F.R. § 130.7(d)(2). If the state’s TMDL is not adequate, EPA must disapprove the TMDL and must write a substitute TMDL for the state within 30 days of the disapproval. *Id.*

24. Under the Clean Water Act’s “constructive submission” doctrine, when a state clearly and unambiguously decides not to submit a required TMDL, courts proceed as though the state had submitted an inadequate TMDL, triggering EPA’s nondiscretionary duty to issue a substitute TMDL. *See Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002); *Alaska Ctr. for the Env’t v. Reilly*, 762 F. Supp. 142 (W.D. Wash. 1991).

The Administrative Procedure Act

25. Under the Administrative Procedure Act, a reviewing court “shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency action includes an agency’s failure to act. 5 U.S.C. § 551(13).

1 30. When Lewis and Clark traversed the Northwest Territory, about 30 million adult
2 salmon returned to the Columbia-Snake river basin each year, making it the most productive
3 salmon river system in the world. Today, runs are often less than ten percent of the historic
4 population.

5 31. Due to population declines, 13 species or populations of Columbia and Snake
6 River salmon and steelhead have been listed for protection under the Endangered Species Act.
7 Other species and populations have already gone extinct.
8

9 32. As one example, endangered Snake River sockeye salmon were historically
10 abundant in several lake systems in Idaho and Oregon. But by the 1990s, a variety of factors led
11 to the demise of all Snake River sockeye salmon except those returning to Redfish Lake in
12 central Idaho. Even at Redfish Lake, the sockeye population had dwindled to fewer than ten fish
13 per year, including some years when no fish returned. Snake River sockeye salmon remain in a
14 perilous state, due in part to high water temperatures—which are expected to worsen due to
15 continuing climate change.
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18 **High Temperatures Impair the Columbia and Snake Rivers and Harm Fish**

19 33. Water temperatures above 20°C negatively affect salmon and steelhead by
20 delaying migration, depleting energy resources, increasing susceptibility to diseases, and
21 reducing survival. Many of these negative effects have been observed at temperatures less than
22 the 20°C.
23

24 34. EPA, Washington, and Oregon have long acknowledged that high summertime
25 water temperatures in the Columbia and Lower Snake Rivers harm salmon and steelhead.
26 Accordingly, Washington and Oregon established EPA-approved temperature water quality
27
28

1 criteria to protect salmon and steelhead spawning, rearing, and migration in the Columbia and
2 Lower Snake Rivers.

3 35. Multiple segments of the Columbia and Lower Snake Rivers are on Washington's
4 and Oregon's 303(d) lists because the states determined that these river segments do not meet the
5 temperature water quality criteria.
6

7 36. During 2015, high summer water temperatures in the Columbia and Snake Rivers
8 proved disastrous for salmon. An estimated 250,000 adult sockeye salmon died while migrating
9 up the Columbia and Snake Rivers due to the effects of encountering warm water exceeding
10 20°C. For endangered Snake River sockeye, the result was catastrophic: 96 percent of adult
11 sockeye returning to the Snake River perished before passing the four Lower Snake Dams.
12

13 37. After the 2015 temperature disaster, the National Marine Fisheries Service
14 ("NMFS") proposed some limited measures intended to address lethal water temperatures. In
15 response to NMFS' modest proposals, EPA called for broader strategies to "reduc[e] the overall
16 river temperatures during the latter part of June and July to improve adult sockeye survival
17 through the Lower Columbia and Lower Snake Rivers." In addition to preventing massive
18 sockeye salmon die-offs, EPA concluded that "maintaining 20°C or below temperatures in the
19 Lower Columbia and Snake Rivers during the late June and July timeframe would be beneficial
20 for adult summer Chinook and steelhead survival . . . and would also be beneficial to juvenile
21 salmon and steelhead out migrating during this period." EPA also noted "[t]he need to lower
22 water temperatures becomes more critical as the Pacific Northwest Region continues to address
23 and mitigate climate change."
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Sixteen Years Ago, EPA Agreed to Write a Temperature TMDL

38. On or about October 16, 2000, EPA, Washington, and Oregon entered into an agreement coordinating the preparation of TMDLs to address temperature pollution impairing the Columbia and Snake Rivers. The agreement was called: “Memorandum of Agreement: Columbia/Snake Rivers Total Maximum Daily Load for Total Dissolved Gas and Temperature.”

39. In the Memorandum of Agreement, EPA and the states agreed that EPA would lead the creation of a temperature TMDL. In 2001, Oregon and Washington requested by letters that EPA create and issue the temperature TMDL in Oregon and Washington.

40. The TMDL would address temperature pollution on the mainstem Columbia River from its mouth upstream to the Canadian border, and on the mainstem Snake River from its confluence with the Columbia upstream to river mile 188.

EPA Released a Draft TMDL in 2003

41. After coordination and input from state, federal, and tribal agencies, EPA produced the “July 2003 Preliminary Draft” of the Columbia/Snake Rivers Temperature TMDL.

42. The July 2003 Preliminary Draft explained that the TMDL’s purpose was to quantify the temperature problems in the Columbia and Lower Snake Rivers and determine the level of improvement needed to meet water quality standards.

43. The July 2003 Preliminary Draft determined that dams on the Columbia and Lower Snake Rivers are responsible for the high water temperatures and exceedances of water quality standards. For example, EPA concluded that Grand Coulee dam on the Columbia River causes temperature increases as high as 6.23°C, and that the four dams on the Lower Snake River can each raise temperatures by 1.2°C to 2.08°C.

1 44. EPA determined that temperature pollution from inflowing tributaries and from
2 point sources like factories has a negligible impact on average river temperatures. EPA then
3 determined what temperature reductions would need to be achieved at each dam in order to
4 comply with water quality standards.

5 45. As stated in the July 2003 Preliminary Draft, EPA intended to release another
6 draft TMDL for public comment and then issue the final TMDL shortly thereafter. Next, Oregon
7 and Washington would issue implementation plans designed to identify and implement feasible
8 management actions for improving temperature.
9

10 **EPA Failed to Issue the TMDL, and Temperature Problems Persist**

11 46. EPA has never issued a final temperature TMDL for the Columbia and Lower
12 Snake Rivers.
13

14 47. Shortly after the July 2003 Preliminary Draft became public, EPA abandoned the
15 temperature TMDL, due in part to pressure from other federal agencies responsible for managing
16 dams on the Columbia and Lower Snake Rivers. However, temperature problems persist and the
17 Columbia and Lower Snake Rivers still fail to meet temperature water quality standards.
18

19 48. Oregon and Washington have indicated that they will not issue temperature
20 TMDLs. Both states are waiting for EPA to issue the TMDL.
21

22 **VI. FIRST CAUSE OF ACTION**

23 49. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

24 50. By entering into the Memorandum of Agreement in 2000, requesting in 2001 that
25 EPA establish and issue the TMDL, and by other acts and omissions, the states of Oregon and
26 Washington clearly and unambiguously expressed their intent not to prepare or submit to EPA
27 temperature TMDLs for the Columbia and Lower Snake Rivers . These actions represent Clean
28

1 Water Act constructive submissions, triggering EPA's mandatory duties to (1) disapprove
2 Oregon and Washington's constructive submissions and (2) prepare a TMDL in 30 days. 33
3 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). To date, EPA has failed to perform these duties.

4 51. Without the Court declaring EPA to be in violation of the Clean Water Act, and
5 without the Court imposing a deadline for EPA to issue a temperature TMDL, EPA is likely to
6 continue its longstanding and ongoing failure to address temperature pollution in the Columbia
7 and Snake Rivers, further injuring Plaintiffs, their members, and others.

8 **VII. SECOND CAUSE OF ACTION**

9
10 52. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

11
12 53. By failing to issue a temperature TMDL for the Columbia and Lower Snake
13 Rivers, EPA has also committed unreasonable delay under the Administrative Procedure Act.
14 The APA requires agencies to address the matters presented to them within a reasonable time. 5
15 U.S.C. §§ 551(13); 706(1).

16
17 54. In 2000, EPA entered into an agreement with Oregon and Washington to prepare
18 the temperature TMDL. In July 2003, EPA released a draft of the TMDL. But EPA has not
19 issued a final TMDL. This 13-and-a-half-year delay in issuing the final TMDL is not reasonable
20 in light of the significant amount of work EPA already completed. Nor is EPA's delay
21 reasonable in light of the timelines set forth in the Clean Water Act and its implementing
22 regulations, which call for swift action to issue TMDLs within 30 days. 33 U.S.C. § 1313(d)(2);
23 40 C.F.R. § 130.7(d)(2).

24
25 55. Furthermore, the consequences of the delay have been severe. High temperatures
26 on the Columbia and Snake Rivers have harmed and continue to harm endangered and threatened
27

1 fish species, and other aquatic resources, and EPA's delay has set back the Clean Water Act's
2 TMDL process for achieving compliance with temperature standards by many years.

3 **VIII. RELIEF REQUESTED**

4 Wherefore, Plaintiffs respectfully request that this Court grant the following relief:

5 A. Issue a declaratory judgment that EPA has violated and continues to violate
6 Section 303(d) of the Clean Water Act, 33 U.S.C. §§ 1313(d), for failing to prepare and issue a
7 final temperature TMDL for the Columbia and Lower Snake Rivers, and/or that EPA has
8 committed unreasonable delay under the Administrative Procedure Act, 5 U.S.C. § 706(1);
9

10 B. Order EPA to promptly issue a lawful temperature TMDL for the Columbia and
11 Lower Snake Rives on a firm schedule to be set by the Court, and in any event no later than one
12 year from this date;
13

14 C. Grant such other preliminary and/or permanent injunctive relief as Plaintiffs may
15 request during the pendency of this case;
16

17 D. Award Plaintiffs their litigation expenses, including reasonable attorney and
18 expert witness fees, as authorized by Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the Equal
19 Access to Justice Act, 28 U.S.C. § 2412, and/or all other applicable authorities; and
20

21 E. Grant such further and additional other relief as this Court deems just and proper
22 in order to remedy Defendant's violations of law and protect the public interest.
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27 ///

1 RESPECTFULLY SUBMITTED this 23th day of February, 2017.

2
3 By: s/ Bryan Hurlbutt

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